SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DISCOVER PROPERTY & CASUALTY INSURANCE COMPANY, et al.,

Plaintiffs,

- against -

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652933/2012 **E**

Hon. Jeffrey K. Oing

Memorandum of Law in Support of Defendants National Football League and NFL Properties LLC's Motion for Leave to File Amended Answer to Amended Complaint and Second Amended Counterclaims and Cross-claims

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PRELIMINARY STATEMENT

The NFL Policyholders[1] move, pursuant to CPLR 3025(b) and the CMO, for leave to file an amended pleading, which includes adding Westport as a party[2] and adding counterclaims and cross-claims for (1) declaratory relief as to the duty to indemnify as to all Insurers; (2) breach of the duty to indemnify as to certain of the Insurers; and (3) declaratory relief as to certain of the Insurers' refusal to content to the Class Settlement.

This amendment was in large part anticipated by the Court and the parties. The CMO states in paragraph (1)c.ii. "that it is agreed that leave shall be freely granted to the NFL Parties to further amend [their] pleading in the future to add a claim for breach of the duty to indemnify in the event any underlying settlement or judgment becomes final." The CMO also states that "[t]he Parties, having conferred, anticipate that a small number of additional insurers of the NFL Parties may be added. . . ."[3]

It was only after January 6, 2017 that the NFL Policyholders learned that a petition for rehearing had not been filed in the U.S. Supreme Court, therefore making the Class Settlement and the district court's Amended Final Order and Judgment final and effective. And the NFL Parties' first payment required by the Class Settlement -- totaling $65 million --

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[1] Capitalized terms in this Memorandum have the same meanings as in the accompanying Affidavit of Merit of Anastasia Danias Schmidt and Affirmation of John E. Hall.

[2] While XL Select Insurance Company ("XL Select") was not named in the Amended Complaint, it is an affiliate of party XL Insurance America, Inc. ("XL"), and XL's Answer to Travelers' Amended Complaint with Cross-claims and Counterclaims refers to an insurance policy issued by XL Select to the NFL Policyholders, which policy is at issue in this action. By contrast, the NFL Policyholders' Second Amended Pleading adds Westport to this action for the first time.

[3] In light of the permissive standard of CPLR 3025(b) and the explicit language in the CMO, the NFL Policyholders sought to avoid motion practice by reaching a stipulation with the Insurers allowing amendment. After the NFL Policyholders asked the Insurers whether they would consent to an amended pleading, the Insurers requested to see a copy of the pleading and a redline showing changes to the NFL Policyholder's previous pleading. The NFL Policyholders provided the insurers with copies of both. Nevertheless, earlier today, the Insurers indicated that the insurer group would not consent, making this motion necessary.

was only made last week, on or about February 6, 2017. The new indemnity-related causes of action the NFL Policyholders seek to assert, including the causes of action against Westport, had not yet accrued at the time the NFL Policyholders filed their prior pleadings. Further, the Court and all parties have been aware that the NFL Policyholders would amend their pleadings to assert those new causes of action once they did accrue, and those causes of action raise the same legal and factual issues as the Insurers' pleadings, so adding the new causes of action will not result in prejudice or surprise to any party. Because Westport has been aware for several years of the NFL Policyholders' potential claims for coverage, and because this matter is still in the preliminary stages, there is no prejudice to Westport from adding it as a party. For these reasons, the Court should grant the NFL Policyholders leave to amend their pleadings.

FACTS

The NFL has been named as a defendant in more than 300 Underlying Lawsuits, including one or more putative class action lawsuits; NFL Properties has been named as a defendant in at least 190 of those lawsuits. Affidavit of Anastasia Danias Schmidt ("Schmidt Aff.") ¶ 3.

No later than May 15, 2014, Westport was notified of the Underlying Lawsuits. Schmidt Aff. Ex. 7. The other insurers named herein had previously been put on notice.

The NFL Policyholders agreed to the Class Settlement with representatives of a class of plaintiffs in the Underlying Lawsuits. Schmidt Aff. Ex. 2. According to its terms, the Class Settlement becomes effective upon the date that all appellate courts with jurisdiction--including the U.S, Supreme Court--affirm the district court's Amended Final Order and Judgment approving the Class Settlement or deny further review of such Amended Final Order and Judgment, such that no future appeal is possible. Schmidt Aff. Ex. 2 at 8-9. The Class Settlement and the Amended Final Order and Judgment became final and effective on

January 7, 2017. Schmidt Aff. ¶¶ 6-10. The first payment required by the Class Settlement became due on February 6, 2017, and was timely made by the NFL Policyholders in the amount of $65 million. Schmidt Aff. ¶ 10.

In the instant litigation, the Insurers have sought declarations regarding their respective obligations under the Policies to indemnify the NFL Policyholders for liability incurred in the Underlying Lawsuits. Affirmation of John E. Hall ("Hall Aff.") Exs. C, D.

The NFL Policyholders have previously taken the position that there is no justiciable controversy regarding the Insurers' indemnification obligation under the Policies for the Class Settlement until no earlier than when the NFL Policyholders incur liability under a final settlement or judgment in the Underlying Lawsuits. Hall Aff. ¶ 8. At the time the NFL Policyholders filed their earlier pleadings and then their Amended Pleading, no such finality had occurred and no indemnity-related payments had been made by the NFL Policyholders. Schmidt Aff. ¶ 10; Hall Aff. ¶¶ 10-11.

Consequently, the NFL Policyholders have until now asserted only counterclaims and cross-claims related to their primary insurers' duties to defend. Accordingly, they have not asserted claims related to the duty to indemnify either against the primary insurers or against insurers issuing umbrella and excess policies, nor have they asserted claims related to certain Insurers' bad faith refusal to consent to the Class Settlement. As the Westport Policies are umbrella, rather than primary, policies, the NFL Policyholders have not previously asserted cross-claims against Westport. Schmidt Aff. ¶ 15; Hall Aff. ¶ 12.

ARGUMENT

I. The NFL Policyholders Should Be Granted Leave to Add Claims Relating to the Insurers' Indemnity Obligation and Certain Insurers' Bad Faith.

Under CPLR 3025(b), leave to amend pleadings "shall be freely given." *Id.* The Court of Appeals has held that "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies and Associates,*

Inc. v. New York City Health & Hospitals Corp. 59 N.Y.2d 755, 757 (1983) (internal citations omitted).

Leave to amend is warranted where the purpose of the amendment is to assert new claims that arose after the previous pleading had been filed. *See Trusthouse Forte (Garden City) Mgmt., Inc. v. Garden City Hotel, Inc.*, 106 A.D.2d 271, 272 (1st Dep't 1984) (leave to amend properly granted where breach of contract asserted in amended pleading arose only after denial of injunctive relief sought in initial pleading). Here, the NFL Policyholders did not yet have grounds to assert their indemnification claims at the time they were required to file their previous Amended Pleading. Hall Aff. ¶ 11. It was only after the Class Settlement subsequently became final that the NFL Policyholders incurred any liability in the underlying litigation and Insurers incurred corresponding indemnity obligations. Schmidt Aff. ¶¶ 11, 18; Hall Aff. ¶ 13. Similarly, it was only after the Class Settlement became final that certain Insurers' bad faith refusal to consent to the Class Settlement became relevant. Consequently, and in keeping with the Court's CMO, the NFL Policyholders should be granted leave to file their Second Amended Pleading asserting their newly available claims.

There is no "prejudice or surprise" where an amended pleading asserts new causes of action that were already anticipated by the other parties and discovery is still underway. *See Bobrowsky v. Lexus*, 215 A.D.2d 424, 424 (2d Dep't 1995) ("The defendants' claims of prejudice are unpersuasive since the additional theory of recovery is based upon the same facts alleged in the original complaint, discovery was ongoing, and the defendants had already been apprised of the new theory of recovery and had begun their investigation thereof before the plaintiff sought to amend her complaint."). The lack of "prejudice or surprise" from granting leave to amend in this instance is readily apparent from the CMO, which states "that it is agreed that leave shall be freely granted to the NFL Parties to further amend [their] pleading in the future to add a claim for breach of the duty to indemnify in the event any

underlying settlement or judgment becomes final." Hall Aff. Ex. F at 1-2. As the CMO makes clear, the Court and the parties have all understood that the NFL Policyholders would amend their pleadings to assert claims based on the Insurers' duties to indemnify them for their liability under the Class Settlement once the Class Settlement and the judgment entered on the Class Settlement became final and effective. That is, both the substance and timing of the NFL Policyholders' Second Amended Pleading were anticipated by the Court and the parties, and leave to amend should be granted as a result.

Furthermore, there is no prejudice where the new causes of action in an amended pleading address issues that were already raised in another party's pleading. *See 911 Alwyn Owners Corp. v. Estate of Rosenthal*, 157 Misc. 2d 828, 832 (Sup. Ct. N.Y. Cnty 1992) (no prejudice found in plaintiff's proposed amendment six years after commencement of action where amendment sought to add cause of action that "raises the same legal and factual issues as are raised by defendants first counterclaim in the amended answer"). From the commencement of this action, Plaintiff insurers have sought a declaratory judgment on their duties to defend and to indemnify the NFL Policyholders for liability in the underlying litigation. The other Insurers have sought similar declarations with respect to themselves. Certain Insurers have also asserted that the NFL Policyholders' entered into the Class Settlement without their consent. The new claims asserted by the NFL Policyholders raise "the same legal and factual issues" that have already been raised by the Insurers. Consequently, granting leave to amend has no prejudicial impact on the Insurers.[4]

[4] The proposed amended pleading also includes some changes to the NFL Policyholders' defense-related allegations. Such amendment is allowed to be made freely, and the relevant Insurers are not prejudiced given the stage of this litigation. Indeed, the affected Insurers have themselves sought affirmative relief on defense-related issues, thereby implicating the same factual and legal issues, and the defense determination ultimately will be decided based on nothing more than a comparison between the Insurers' policy language and the underlying allegations.

II. The NFL Policyholders Should Be Granted Leave to Join Westport as a Third-Party Defendant.

As noted above, leave to amend should be granted when the need to amend arose after the previous pleading had been filed. *See Trusthouse Forte*, 106 A.D.2d at 272. That same reasoning applies to the addition of Westport to this action as a third-party defendant. As Westport (an umbrella layer carrier) has not been obligated to defend the NFL Policyholders in the Underlying Lawsuits, the NFL Policyholders have had no need to bring Westport into the case while they were only asserting affirmative causes of action related to certain Insurers' defense-related obligations. Now that the Class Settlement and the Amended Final Order and Judgment have become final and effective, however, the NFL Policyholders have accrued declaratory relief causes of action against Westport based on its obligation to indemnify them, and they should be granted leave to assert those new causes of action against Westport.

In addition, granting leave to amend will not surprise or prejudice Westport. Westport has acknowledged that its predecessor issued liability policies to the NFL Policyholders, and the NFL Policyholders alerted Westport to the fact that the Class Settlement has become final. Schmidt Aff. Exs. 7, 9. As a result, Westport has had every reason to expect that the NFL Policyholders would thereafter seek to enforce Westport's potential indemnity obligations under the Westport Policies. Moreover, although this action was formally commenced in 2012, it has been stayed for most of the intervening period and discovery has only barely begun, so there is no prejudice to Westport's ability to litigate this case. *See Bobrowsky*, 215 A.D.2d at 424 (no prejudice found where discovery still ongoing and there was no bar to new party's ability to prepare its defense).

Conclusion

For the foregoing reasons, the Court should grant the NFL Policyholders' leave to amend their Answer, Counterclaims, and Cross-Claims as set forth in Exhibit A to the Affirmation of John E. Hall.

Dated: New York, New York
February 15, 2017

Respectfully submitted,

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